Chan Eng Leong & Anor v Goh Choon Kim & Ors and another case

HIGH COURT (PENANG) — CIVIL SUIT NOS PA-22NCVC-8–01 OF 2020 AND PA-22NCVC-9–01 OF 2020
WONG HOK CHONG JC
28 MAY 2021

Civil Procedure — Striking out — Statement of claim — Application to strike out plaintiff's claim — Whether shareholders agreement valid and enforceable — Whether there was serious issue to be tried — Whether statement of claim was unsustainable Civil Procedure — Injunction — Application for interlocutory injunction — Whether status quo of composition of board of directors should be preserved — Whether court had power to prevent EGM from taking place — Whether shareholders agreement valid and enforceable — Whether injunction should be granted

Companies and Corporations — Shares — Shareholders agreement — Whether shareholders agreement valid and enforceable — Whether estoppel by convention applied — Whether terms purported to bind transferee and/or new shareholders — Whether entrenchment and voting clauses fettered company's statutory right to remove director — Whether there was serious issue to be tried — Companies Act 2016 s 206(1)(a)

The two suits pertained to a dispute between the same shareholders over the control of two companies, namely, Global Tobacco Manufacturers (International) Sdn Bhd ('Suit No 8') and GTM Marketing Sdn Bhd ('Suit No 9'). The plaintiffs in both suits were Chan Eng Leong ('P1') and his wife, Chong Choo Bee ('P2'). While Goh Choon Kim ('D1') and his wife, Ong Ah Poh ('D2') were the defendants in both suits. The gist of both cases was the same. D1 and D2 had called for an EGM to remove P1 and P2 as directors and to appoint themselves and/or their nominees in their stead. P1 and P2 alleged that this contravened the terms of the shareholders' agreements between D1 and D2 and them. Hence, they commenced legal proceedings to prevent the proposed change to the composition of the board of directors and simultaneously filed an application for an interlocutory injunction for the same reliefs. The two applications before the court in each of the suits were: (a) P1 and P2's application for an interlocutory injunction to preserve the status quo of the composition of the board of directors pending the disposal of the suit (encl 3 in both Suit No 8 and Suit No 9); and (b) D1 and D2's application to strike out the statement of claim on the basis that the shareholders' agreements were invalid and/or unenforceable (encl 32 in Suit No 8 and encl 33 in Suit

No 9). The thrust of D1 and D2's case in resisting the plaintiffs' application was that: (i) there was no serious issue to be tried; (ii) the two shareholders' agreement or the terms relied on by the P1 and P2 were invalid and/or unenforceable because it purported to bind transferee and/or new shareholders; and (iii) the entrenchment clauses and the voting clauses in the second shareholders' agreement were invalid and unenforceable at law because they fettered the company's statutory right to remove a director under s 206(1)(a) of the Companies Act 2016 ('the CA'). The issues that arose for consideration before the court were: (A) whether the court was prevented from making an order to prevent an EGM from taking place once it had been called because it was statutorily provided for; (B) whether the interlocutory injunction should be granted; and (C) whether the shareholders agreement was invalid and unenforceable.

Held, dismissing the P1 and P2's applications (encl 3) and allowing D1 and D2's applications (encls 32 and 33):

(1) The court would generally not stop a company meeting from proceeding as they were part of a prescribed statutory process. However, it was well within the powers of the court, if P1 and P2's application merited it, to stop, not the EGM, but D1 and D2 from voting at the EGM and/or carrying through with the proposed resolutions and to prevent D1 from being removed as the director of D3. The net effect or desired result was the same (see para 32).

(2) P1 and P2 had behaved, performed their respective obligations and benefited from the second shareholders' agreement throughout on the assumption that it applied to the acquired shares. They were, thus, estopped by convention from resiling from the position that both parties had assumed and acted upon (see paras 37 & 39).

(3) A shareholders' agreement that purported to bind the transferee or the new shareholders created more than just personal obligations or exeptio personalis and was, as such, invalid and unenforceable. In this case, the offending clauses clearly purported to bind the transferee or new shareholders. Therefore, the second shareholders' agreement was invalid and unenforceable at law (see paras 55 & 62).

(4) The court agreed with D1 and D2 that s 206(1)(a) of the CA gave the company the statutory right to remove a director by ordinary resolution. Any agreement to fetter the company's statutory power to do so was invalid and unenforceable. The distinction drawn by P1 on P2 between private and public companies was only significant if the company had a constitution that expressly excluded the statutory right to remove a director by ordinary resolution. Where there was no constitution or the

constitution was silent or, as in this case, the constitution affirmed the statutory right, the distinction was one that was without substance (see paras 70 & 72).

(5) The shareholders had the right or freedom to agree to a voting arrangement (D1 and D2 forfeiting their voting rights) via a shareholder's agreement inter se, just in the same way that the shareholders were free to agree to the weighted voting rights via the articles of association. There was no significant distinction. By virtue of s 206(1)(a) of the CA, Parliament did not intend to exclude that right or freedom in relation to the removal of director by ordinary resolution. In the premise, the court agreed with P1 and P2 that the voting clauses were valid and enforceable. In other words, P1 and P2 could rely on the voting clauses to prevent the majority shareholders from voting thereon to remove a director (see paras 95–97).

(6) The shareholders' agreement was therefore in toto invalid and unenforceable on the ground that it was not an agreement creating only personal obligations or exceptio personalis but also purported to bind the transferee or new shareholders. It was also held that the substratum of P1 and P2's statement of claim was unsustainable and not a serious issue to be tried, hence, their application for interlocutory injunction was dismissed. Whereas for D1 and D2, their application to strike out the said statement of claim was allowed. The outcome of Suit No 9 was agreed by the parties to follow the outcome of Suit No 8 (see paras 98–100).

[Bahasa Malaysia summary

Kedua-dua saman tersebut berkaitan dengan pertikaian antara pemegang saham yang sama ke atas kawalan dua syarikat, iaitu Global Tobacco Manufacturers (International) Sdn Bhd ('Guaman No 8') dan GTM Marketing Sdn Bhd ('Guaman No 9'). Plaintif dalam kedua-dua saman tersebut adalah Chan Eng Leong ('P1') dan isterinya, Chong Choo Bee ('P2'). Manakala Goh Choon Kim ('D1') dan isterinya, Ong Ah Poh ('D2') adalah defendan di dalam kedua-dua saman tersebut. Asas peritikaian kedua-dua saman tersebut adalah sama. D1 dan D2 telah memohon EGM dijalankan untuk menyingkirkan P1 dan P2 sebagai pengarah dan melantik diri mereka dan/atau calon mereka bagi menggantikan mereka. P1 dan P2 mendakwa bahawa perkara ini melanggar terma perjanjian pemegang saham antara D1 dan D2 dan mereka. Oleh itu, mereka memulakan prosiding undang-undang untuk menghalang cadangan perubahan kepada komposisi lembaga pengarah dan pada masa yang sama memfailkan permohonan injunksi interlokutori untuk relif yang sama. Dua permohonan di hadapan mahkamah ini dalam setiap saman itu adalah: (a) permohonan P1 dan P2 untuk injunksi interlokutori untuk mengekalkan status quo komposisi lembaga pengarah sementara menunggu pelupusan saman (lampiran 3 dalam kedua-dua

Guaman No 8 dan Guaman No 9); dan (b) Permohonan D1 dan D2 untuk mengeluarkan penyataan tuntutan atas dasar bahawa perjanjian pemegang saham tidak sah dan/atau tidak boleh dikuatkuasakan (lampiran 32 dalam Saman No 8 dan lam 33 dalam Suit No 9). Asas pertikaian kes D1 dan D2 dalam menentang permohonan plaintif adalah bahawa: (i) tiada isu serius yang perlu dibicarakan; (ii) perjanjian dua pemegang saham atau terma yang bergantung kepada P1 dan P2 adalah tidak sah dan/atau tidak boleh dikuatkuasakan kerana ianya dikatakan mengikat penerima pindahan dan/atau pemegang saham baru; dan (iii) klausa entrenchment dan klausa pengundian dalam perjanjian pemegang saham kedua adalah tidak sah dan tidak boleh dikuatkuasakan di undang-undang kerana mereka mencabuli hak statutori syarikat untuk memecat pengarah di bawah s 206(1)(a) Akta Syarikat 2016 ('AS'). Isu-isu yang timbul untuk pertimbangan mahkamah ini adalah: (A) sama ada mahkamah dihalang daripada membuat perintah untuk menghalang EGM daripada berlaku sebaik sahaja ia dipanggil kerana ianya telah diperuntukkan secara statutori; (B) sama ada injunksi interlokutori harus diberikan; dan (C) sama ada perjanjian pemegang saham tersebut tidak sah dan tidak boleh dikuatkuasakan.

Diputuskan, membenarkan permohonan P1 dan P2 (lampiran 3) dan membenarkan permohonan D1 dan D2:

(1) Mahkamah secara umumnya tidak akan menghalang mesyuarat syarikat dari meneruskan prosiding tersebut kerana ianya sebahagian daripada peruntukan statutori yang ditetapkan. Walau bagaimanapun, mahkamah mempunyai kuasa untuk membenarkan permohonan P1 dan P2 untuk menghentikan, bukan EGM, tetapi D1 dan D2 daripada mengundi di EGM dan/atau membawa melalui dengan resolusi yang dicadangkan dan untuk mengelakkan D1 daripada dikeluarkan sebagai pengarah D3. Keputusan keseluruhannya masih sama (lihat perenggan 32).

(2) P1 dan P2 telah berkelakuan, melaksanakan kewajipan masing-masing dan mendapat manfaat daripada perjanjian pemegang saham kedua berdasarkan andaian bahawa ia terpakai kepada saham yang diperolehi. Oleh itu, mereka diestop oleh konvensyen daripada mengulangi kedudukan yang telah diandaikan dan tindakan kedua-dua pihak (lihat perenggan 37 & 39).

(3) Perjanjian pemegang saham yang dikatakan mengikat penerima saham atau pemegang saham baru telah mencipta lebih daripada sekadar kewajipan peribadi atau exeptio personalis dan, oleh itu, tidak sah dan tidak boleh dikuatkuasakan. Di dalam kes ini, klausa yang terjejas jelas mengikat penerima saham atau pemegang saham baru. Oleh itu, perjanjian pemegang saham kedua adalah tidak sah dan tidak boleh dikuatkuasakan menurut undang-undang (lihat perenggan 55 & 62).

(4) Mahkamah ini bersetuju dengan D1 dan D2 bahawa s 206(1)(a) AS memberikan syarikat hak statutori untuk membuang pengarah dengan resolusi biasa. Sebarang perjanjian untuk menggugat kuasa statutori syarikat untuk berbuat demikian adalah tidak sah dan tidak boleh dikuatkuasakan. Perbezaan oleh P1 pada P2 antara syarikat swasta dan awam hanya penting sekirnya syarikat tersebut mempunyai perlembagaan yang secara jelas mengecualikan hak statutori untuk memecat pengarah dengan resolusi biasa. Didalam situasi yang mana tiada perlembagaan atau perlembagaan adalah senyap mengenai perkara ini atau, seperti dalam kes ini, perlembagaan menegaskan hak statutori, tiada perbezaan yang dapat dilihat (lihat perenggan 70 & 72).

(5) Pemegang saham mempunyai hak atau kebebasan untuk bersetuju dengan aturan pengundian (D1 dan D2 telah mengenepikan hak mengundi mereka) melalui perjanjian pemegang saham, sama seperti pemegang saham bebas untuk bersetuju dengan hak mengundi melalui artikel syarikat. Tiada perbezaan yang boleh dilihat. Berdasarkan s 206(1)(a) AS, Parlimen tidak berhasrat untuk mengecualikan hak atau kebebasan tersebut berhubung dengan pemecatan pengarah melalui resolusi biasa. Oleh yang demikian, mahkamah ini bersetuju dengan P1 dan P2 bahawa klausa pengundian adalah sah dan boleh dikuatkuasakan. Dalam erti kata lain, P1 dan P2 boleh bergantung kepada fasal pengundian untuk menghalang majoriti daripada mengundi untuk memecat pengarah (lihat perenggan 95–97).

(6) Oleh itu, perjanjian pemegang saham tersebut adalah tidak sah dan tidak boleh dikuatkuasakan dengan alasan bahawa ianya bukan perjanjian yang hanya mewujudkan kewajipan peribadi atau exceptio personalis tetapi juga dikatakan mengikat penerima saham atau pemegang saham baru. Mahkamah juga mendapati bahawa asas tuntutan pernyataan tuntutan P1 dan P2 tidak dapat dikekalkan dan ianya bukan satu isu yang serius untuk dibicarakan. Oleh itu, permohonan untuk injunksi interlokutori ditolak. Manakala bagi D1 dan D2, permohonan mereka untuk mengeluarkan penyataan tuntutan tersebut dibenarkan. Keputusan Saman No 9 telah dipersetujui oleh pihak-pihak untuk mengikuti keputusan Saman No 8 (lihat perenggan 98–100).]

Cases referred to

Bushell v Faith [1970] AC 1099, HL (folld)
Hong Leong Bank Bhd v Permintex Automotive Sdn Bhd [2019] MLJU 1405, HC (refd)
Muir v Lampl [2004] 4 HKC 626 (folld)
Re Greater Beijing Region Expressway Ltd [1994] 4 HKC 807, CA (folld)
Russell v Northern Bank Development Corporation Ltd & Ors [1992] 1 WLR 588, HL (folld)
Thomas Abercromby Welton v Joseph John Saffery [1897] AC 299, HL (folld)

Legislation referred to

Companies Act 2016 ss 206, 206(1)(a), (1)(b), (2), 310, 311
Companies Act 1948 [UK] ss 184

Karin Lim (A Suppiah, Nicholas Lim and Maegen Seah with her) (Presgrave & Matthews) in Civil Suit Nos PA-22 NCVC-8–01 of 2020 and PA-22 NCVC-9–01 of 2020 for the plaintiffs.
Wong Chong Wah (M Thayalan, Wong Chun-Keat and Chong Jun Min with him) (JA Yeoh) in Civil Suit Nos PA-22 NCVC-8–01 of 2020 and PA-22 NCVC-9–01 of 2020 for the first and second defendants.
Lim Choon Khim (Chooi, Saw & Lim) in Civil Suit No PA-22 NCVC-8–01 of 2020 for the third defendant.
(Goik, Ramesh & Loo) in Civil Suit No PA-22 NCVC-9–01 of 2020 for the fourth defendant.

Wong Hok Chong JC:

INTRODUCTION

[1] These two suits pertain to a dispute between the same shareholders over the control of two companies.

[2] The protagonists, on the one side, are Chan Eng Leong and his wife, Chong Choo Bee, the first (P1) and second (P2) plaintiffs respectively in both suits. And on the other side are Goh Choon Kim and his wife, Ong Ah Poh, the first (D1) and second (D2) defendants respectively in both suits.

[3] The subject companies are Global Tobacco Manufacturers (International) Sdn Bhd in Suit PA-22NCVC-8–01 of 2020 ('Suit No 8') and GTM Marketing Sdn Bhd in Suit PA-22NCVC-9-01 of 2020 ('Suit No 9'), the third defendants in the respective suits.

[4] There are some differences between the two suits in terms of parties and representations:

(a) in Suit No 8, the subject company is separately represented. For the purposes of the instant applications, they have taken a neutral stand.

(b) in Suit No 9, the subject company is not represented. This, I am told, is because the company is in a deadlock situation. There are also a couple of additional parties:

(i) there is a third plaintiff, P1 and P2's nominee company, Natural Transforms Sdn Bhd (P3); and

(ii) there is a fourth defendant, the company secretary. Kee Bee Ai

(D4), She has agreed to be bound by the decision of the court without further participation

[5] The differences are not materially significant to the dispute between the protagonists. The gist of both cases is the same. D1 and D2 had called for an EGM to remove P1 and P2 as directors and to appoint themselves and/or their nominees in their stead. P1 and P2 says that this contravenes the terms of the shareholders' agreements between D1 and D2 and them. Hence, they commenced legal proceedings to prevent the proposed change to the composition of the board of directors.

THE TWO APPLICATIONS

[6] There are two applications before the court in each of the suits:

(a) P1 and P2 applied for an interlocutory injunction to preserve the status quo of the composition of the board of directors pending the disposal of the suit (encl 3 in both Suit No 8 and Suit No 9); and

(b) D1 and D2 applied to strike out the statement of claim. They say that the shareholders' agreements are invalid and/or unenforceable (encl 32 in Suit No 8 and Encl 33 in Suit No 9).

[7] Learned counsels took the common stand that any differences between the two cases would not be cause for the court to arrive at different outcome and agreed that the court need only hear Suit No 8 and that it would bind suit No 9.

[8] Further, seeing that the thrust of D1 and D2's basis for resisting the interlocutory injunction (encl 3), that there is no serious issue to be tried, and the basis to strike out the statement of claim are premised on the same point, that is the validity and enforceability of the shareholders agreement, learned counsels agreed that the two applications be heard together. There are of course, other factors to be considered in granting an interlocutory injunction if it is found that there is a serious issue to be tried.

DECISION

[9] I heard the applications filed under Suit No 8 and after considering all the arguments, I dismissed the P1 and P2's application for an interlocutory injunction and allowed D1 and D2's application to strike out the statement of claim. Suit No 9, as had been agreed, met a similar fate. These are the grounds for my decision.

A BACKGROUND

[10] The background facts for Suit No 8 are as follows.

B **[11]** D3 was incorporated in 2003 and has an issued and paid-up capital of RM1.5m divided into 1.5m ordinary shares. Its shares were originally owned by D1, D2 and their family members (the Gohs):

(a) D1 (Goh Choon Kim) — 600,000 shares (40%);

C (b) D2 (Ong Ah Poh, D1's wife) — 525,000 shares (35%).

(c) Goh Choon Seang (D1's brother) ('brother') — 150,000 shares (10%); and

(d) Goh Kim Heong (D1's nephew/Brother's son) ('nephew') — 225,000 shares (15%).

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[12] In 2019, the Goh family divested part of their stake in D3 to D1, D2 and their nominee (the Chans):

E (a) P1 (Chan Eng Leong);

(b) P2 (Chong Bee Choo, P1's wife); and

(c) Natural Transform Sdn Bhd (P1 and P2's nominee company) ('Natural Transform').

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[13] To this end, the relevant parties entered into two share sale agreements with two corresponding shareholders' agreement.

First share sale agreement

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[14] First, the nephew entered into a share sale agreement with Natural Transform dated 24 April 2019 where the nephew sold all his shares (225,000 shares or 15%) in D3 to Natural Transform ('first share sale agreement') — The sale was completed on or about 29 May 2019,

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First shareholders' agreement

[15] In conjunction with the first share sale agreement, the shareholders (Natural Transform on the one side and D1, D2 and the brother on the other) and the company (D3) entered into a shareholders' agreement where parties agreed on the terms of managing the company ('first shareholders' agreement'). It was, however, dated later on 7 August 2019. Broadly speaking, the incoming (the Chans) and the existing (the Gohs) shareholders would have an equal say in the management of D3.

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Second share sale agreement

[16] Second, four months later, D1 entered into a share sale agreement with P1 and P2 dated 7 August 2019 where the D1 sold some of his shares (450,000 shares or 20%) in D3 to P1 and P2 Jointly ('second share sale agreement'). The sale was completed on or about 4 November 2019.

Shareholding after sale

[17] Following the two share sale agreements, the Chan family had acquired and owned 45% of the shares in D3;

(a) Natural Transform owned 225,000 shares (15%);

(b) P1 owned 225,000 shares (15%); and

(c) P2 owned 225,000 shares (15%):
while the Goh Family retained 55% of the shares in D3:

(d) D1 (Goh Choon Kim) owned 375,000 shares (25%);

(e) D2 (Ong Ah Poh, D1's wife) owned 300,000 shares (20%); and

(f) Goh Choon Seang (D1's brother ('brother')) owned 150,000 shares (10%).

Second shareholders' agreement

[18] In conjunction with the second share sale agreement, the shareholders (PI, P2, Natural Transform on the one part and D1, D2 and the brother on the other part) and the company (D3) entered into another shareholders' agreement dated 7 August 2019 where parties, as before, agreed on terms of managing the company ('second shareholders' agreement' or 'SHA').

[19] This time, there was shift from the shareholders' agreement. The incoming shareholders (the Chans), as minority shareholders, would now have the absolute say in the management of D3 to the exclusion of the existing shareholders (the Gohs) who were still the majority shareholders. This is the shareholders' agreement that P1 and P2 are relying on in this suit

Directors (the Chans)

[20] As at the date of the shareholders' agreement (7 August 2019), P1 was already a director. He was subsequently joined by P2 on the board on 16 August 2019. They were the only directors of D3.

Dispute arose

[21] Just four months later, in December 2019, a dispute had arisen over the control of D3.

Requisition of meeting under s 311 of the Companies Act 2016 ('the CA')

[22] On 16 December 2019, D2 requisitioned the board of directors (PI and P2) under s 311 of the CA, attached with D1's special notice under s 206 of the CA, to convene an extraordinary general meeting (EGM) to pass the following resolutions ('requisition'):

(a) remove D1 and D2 as directors; and

(b) appoint P1 and the nephew as directors.

[23] On the same day (16 December 2019), the company secretary issued a notice to P1 and P2 notifying that the meeting requisitioned by D1 and D2's was tentatively fixed for 16 January 2019 ('first EGM notice'), This prompted P1 and P2 to act

Suit and application for interim injunction

[24] On 7 January 2020. P1 and P2 filed this suit to enforce their management rights under the second shareholders agreement. They sought for an injunction to restrain D1 and D2 from: (a) convening the proposed EGM or any general meetings; or (b) voting or passing any resolution thereto to: (i) remove P1 and P2 as directors; or (ii) to appoint D1 and D2 as new directors. The plaintiffs had simultaneously filed an application for an interlocutory injunction for the same reliefs (encl 3).

Calling for meeting under s 310 of the CA

[25] At about the same time, on 8 January 2020, D1 issued another notice to convene an EGM, this time under s 310 of the CA, to be held on *23 January 2020* ('second EGM notice') to pass a resolution to appoint new directors, namely, the same two new directors proposed in the first EGM notice and, in addition thereto, Ong Tang Chuan.

Suit broad enough to cover both EGM

[26] Although at the time of filing of the suit, the second EGM notice had yet to be issued, the plaintiffs' suit and application is broad enough to restrain the meeting called by second EGM notice.

THE PLAINTIFF'S CLAIM

[27] P1 and P2's claim is as follows. Notwithstanding that D1 and D2 were the majority shareholders, by the shareholders' agreement, D1 and D2 had agreed that P1 and P2 would have full control over the management of D3. This included the right to appoint and dismiss directors vide cll 8.1 (p) and 9.1 of the second shareholders' agreement, In other words. D1 and D2 had forfeited their voting rights on the shares that they own. I shall refer to these clauses collectively as the 'Voting Clauses'.

[28] Clauses 8.1 (p) and 9.1 of the second shareholders' agreement provides as follows:

> Conduct of Company's Affairs
>
> 8.1 Notwithstanding anything to the contrary contained in this Agreement or in the Articles of Association of the Company the following matters (whether transacted at meetings of the Board and/or at general meetings of the Company) shall be decided absolutely by the New Shareholder at their full discretion:-
>
> ...
>
> (p) appointment or dismissal of any director of the Company or any material change in the authority of the director of the Company;
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> ...
>
> 9. Shareholders' Obligation to Each Other
>
> 9.1 It is hereby agreed that in amplification and not in derogation to the provisions of Clause 8 above, the First Party hereby covenant and undertake that the New Shareholder shall be fully in charge of the management of the Company.

[29] In addition, there was also a a specific clause that entrenched incumbent director at the material time, that is D1, ie, he could not be removed vide cll 4.2 and 4.4 of the shareholders' agreement, I shall refer to this clause as the 'Entrenchment Clauses'.

[30] Clauses 4.2 and 4.4 of the second shareholders' agreement provides as follows:

> 4. Appointment of Directors
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> ...
>
> 4.2 Any appointment of a new Director by the Existing Shareholders shall require consent from the New Shareholder and vice versa the appointment of a new director by the New Shareholder shall require the consent of the Existing Shareholders.
>
> ...

A 4.4 Insofar this Agreement is subsisting, the Shareholders mutually and irrevocably agreed that the Director appointed herein on the Commencement Date shall not be removed under whatsoever circumstances and shall be remained in office save and except for the ground expressly stipulated in Clause 5.1 hereof.

B REMEDY ISSUE

[31] At this juncture, I would like to briefly address a point raised by D1 and D2. They say that the court cannot make an order to prevent an EGM from taking place once it has been called because it is statutorily provided for.

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[32] I agree that the court would generally not stop a company meeting from proceeding as they are part of a prescribed statutory process. However, it is well within the powers of the court, if P1 and P2's application merits, to stop, not the EGM but D1 and D2 from voting at the EGM and/or carrying through with the proposed resolutions and to prevent D1 from being removed as a director of D3. The net effect or desired result is the same.

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THE TWO APPLICATIONS

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[33] I turn now to the two applications. In order to justify an interlocutory injunction, P1 and P2 are required to satisfy the court that: (a) there is a serious issue to be tried; (b) damages will not be an adequate remedy; and (c) the balance of convenience lies in granting the injunction, and if it is equally balanced, the injunction would maintain the status quo.

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[34] The thrust of D1 and D2's case in resisting the application is that there is no serious issue to be tried. They say that the second shareholders' agreement, or at least the terms relied on by the P1 and P2, are invalid and/or unenforceable. It is on this same basis that D1 and D2 have filed an application to strike out the statement of claim (encl 32).

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D1 AND D2'S GROUNDS

H **[35]** D1 and D2 say that the second shareholders' agreement (or the terms relied thereon) is invalid and unenforceable for the following reasons:

(a) the second shareholders' agreement, by its express wordings, only applies to shares subscribed by and issued to the plaintiffs. As the shares owned by P1 and P2 were purchased from the defendants — as opposed to subscribed by and issued to the plaintiffs — the second shareholders agreement does not apply to present circumstances;

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(b) the second shareholders' agreement is invalid and unenforceable at law because it purports to bind transferee and/or new shareholders; and

(c) the *entrenchment clauses* and the *voting clauses* in the second shareholders' agreement are invalid and unenforceable at law because they fetter the company's statutory right to remove a director under s 206(1)(a) of the CA.

FIRST ISSUE

Subscribed shares

[36] D1 and D2 say that the second shareholders' agreement does not apply in the circumstances because the shares held by P1 and P2 were acquired from the Gohs, whereas the second shareholders' agreement, by its express wordings, only applies to shares subscribed by and issued to the P1 and P2. From the reading of the agreement there is merit to the proposition.

P1 and P2's view

[37] However, P1 and P2 say that this was a mutual mistake; and that the parties have behaved, performed their respective obligations and benefited from the second shareholders' agreement throughout on the assumption that it applied to the acquired shares, notwithstanding what is said in the agreement, Therefore, the parties are estopped by convention from resiling from the position that both parties have assumed and acted upon.

Estoppel by convention

[38] The legal principles for estoppel by convention was explained in *Hong Leong Bank Bhd v Permintex Automotive Sdn Bhd* [2019] MLJU 1405 at pp 23–25 of the judgment I have reproduced the relevant portion:

> [93] The species of estoppel relied upon by the defendant in this case were estoppel by convention and estoppel by conduct
>
> [94] Estoppel by convention was described by Lord Steyn in *Republic of India v India Steamship Co Ltd (No 2) (The Indian Endurance)* [1998] AC 878 in the following terms:
>
> > It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption ...
>
> [95] Estoppel by convention arises through the mutual conduct of parties based on a common, but mistaken, assumption of law or fact. Its basis is consensual, and it operates to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts. If and when the common assumption is revealed to he mistaken, the parties may nevertheless be estopped from departing from it for the

purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so (*Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 2013).

Court's finding

[39] I agree with D1 and D2 and find that P1 and P2 have behaved. performed their respective obligations and benefited from the second shareholders' agreement throughout on the assumption that it applied to the acquired shares. They are, thus, estopped by convention from raising this issue.

SECOND ISSUE

Shareholders' agreement is invalid and unenforceable

[40] D1 and D2 say that the shareholders' agreement is in toto invalid and unenforceable at law because it purports to bind transferee or new shareholders,

Offending clauses

[41] The offending clauses are found at paras 10.3 and 19.1:

> 10. *Transfer or Disposal of Shares.*
>
> ...
>
> 10.3 The Shareholder transferring his shares (hereinafter referred to as 'the Transferor') shall incorporate the following conditions as conditions precedent (unless otherwise waived in writing by the remaining Shareholders) to the transfer of shares to any third party not already a party to this Agreement (hereinafter referred to as 'the Transferee'):-
>
> (a) the Transferee accepts and is bound by the terms of his Agreement (subject only to such variations, additions and other alterations as may be necessary to make such covenant consistent with this Agreement and his Agreement shall have full force and effect and shall be read and construed and be enforceable as if the terms of such covenant are inserted in this Agreement by way of addition or substitution or deletion as the case may be) and until such Transferee is so bound, the Company shall not register any such person as the holder of any share;
>
> (b) the Transferee shall assume all the liabilities of the Transferor under this Agreement; and
>
> (c) the Transferor shall remain liable and be responsible for the due discharge, performance and observance of all its liabilities and obligations whether actual or contingent arising out of or in respect of or in connection with this Agreement and in respect of the shares to be transferred at any time up

to and including the date of the sale, and shall remain entitled to all rights and benefits arising out of or in respect of or in connection with such shares for such period of time.

...

19. Successors and Assigns

19.1 This agreement shall operate for the benefit of and be binding on the successors in title and permitted assigns of each Shareholders.

Legal basis

[42] There is sound legal basis for this rule. A company is purely a creature of statute. Hence, what the company and its shareholders can or cannot do is determined by the statute. In so far as regulating the contractual relationship between the company and shareholders and the between the shareholders themselves, it is by way of the articles of association.

[43] Shareholders are, nevertheless, not prohibited from making private agreements between themselves outside the articles of association, In fact, such private agreements are common. They supplement the articles of association with terms that regulate the shareholders' conduct on matters that affect the affairs of the company. Common topics include, as in this case, voting rights, control of management and the representation on the board of directors.

[44] However, the validity and enforceability of such agreements are subject not only to the usual principles of contract law. For a shareholders' agreement, or specific terms of the shareholders agreement, to be valid and enforceable, there are additional conditions that must be complied with.

Welton v Saffery (House of Lords)

[45] For one, the shareholders' agreement must only create *personal obligations or an exceptio personalis against themselves only.* It must not be more than that, and in particular, it must not purport to bind non-assenting, transferee or new shareholders. The oft quoted dicta for this rule can be traced to Lord Davey's speech in the House of Lords in *Thomas Abercromby Welton v Joseph John Saffery* [1897] AC 299 ('Welton v Saffery') at p 331:

> Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. *But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or on exceptio personalis against themselves only*, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders ...

Russell (House of Lords)

[46] This passage was cited with approval more recently by the House of Lords in *Russell v Northern Bank Development Corporation Ltd & Ors* [1992] 1 WLR 588 ('Russell'), vide Lord Jaunceys speech (at p 593). Lord Jauncey then went on to apply the rule to the facts in *Russell*.

[47] First, with respect to the agreement between the shareholders inter se: In coming to the conclusion that the agreement between the shareholders inter se did not offend the rule, he made the following observation (at p 593):

> ... affects only existing shareholders and *does not purport to bind other persons who may at some future date become shareholders in TBL by allotment or transfer* ...

And (at p 594):

> ... This agreement is *purely personal to the shareholders* who executed it and as I have already remarked *does not purport to bind future shareholders.* ...

[48] Second, with respect to the agreement between the shareholders and the company; Here, Lord Jauncey concluded that the relevant clause did offend the rule. In reaching this decision, he observed that the effect of the company's obligation purported to bind new shareholders:

> ... TBL on the other hand agreed that its capital would not be increased without the consent of each of the shareholders. This was a clear undertaking by TBL in a formal agreement not to exercise its statutory powers for a period which could, certainly on one view of construction, *last for as long as any one of the parties to the agreement remained a shareholder and long after the control of TBL had passed to shareholders who were not party to the agreement*. As such an undertaking it is, in my view, as obnoxious as if it had been contained in the articles of association and therefore is unenforceable ...

[49] It is clear from Lord Jauncey's speech that a shareholders' agreement that once the agreement purports to do more than create personal obligations or an *exceptio personalis* against themselves only, ie, if it purports to bind non-assenting, transferee or new shareholders, it becomes invalid and unenforceable.

Clauses that purport to bind transferee or new shareholders

[50] The validity and enforceability of shareholders' agreement between shareholders inter se, which contains an express provision that purports to bind transferee or new shareholders, as is the case here, was considered by the Hong Kong Court of Appeal in *Re Greater Beijing Region Expressway Ltd* [1994] 4 HKC 807 ('Greater Beijing') and the Hong Kong Court of First Instance in *Muir v Lampl* [2004] 4 HKC 626 ('Muir v Lampl').

[51] In cases, the respective courts held that a shareholders' agreement that purports to bind transferee or new shareholders was invalid and unenforceable.

Greater Beijing (Hong Kong Court of Appeal)

[52] Cheung J in delivering the judgment of the Hong Kong Court of Appeal in *Greater Beijing* (1994) held as follows (at pp 821–822):

> In *Russell*, Lord Jauncey adopted the approach of Lord Davey in *Welton* and upheld an agreement between shareholders on how their voting rights in relation to the creation or issue of shares in a company was to be exercised on the basis that the agreement was purely personal to themselves. He only held invalid the part of the agreement in which the company itself was a party.
>
> In this case, under art 26 of the agreement, *it is a condition precedent to the transfer shares in Miracle that the transferor must 'agree to be bound by and, shall be entitled to the benefits of the Agreement' as if he is the original party.* This mischief envisaged by Lord Davey as far as non-assenting shareholders are concerned is, of course, not present. However, *the agreement clearly intends to bind future shareholders, not merely in that capacity as individuals, but as shareholders*. In my view, this agreement is being elevated to the status of a regulation to company. *This goes beyond merely creating personal obligation between individuals. On the authority of Lord Davey in Welton, the agreement should not be upheld.*

Corporate powers and accountability by Loh Siew Cheang

[53] Although I am informed by learned counsels that there is, as yet, no local reported case on this issue, this proposition is not entirely lost in our jurisdiction, The above passage by Cheung J was, incidentally, quoted in the textbook, *Corporate Powers and Accountability by Loh Siew Cheang* (3rd Ed 2018) (at p 98) when discussing the topic of *Fetters on Statutory Rights.*

Muir (Hong Kong Court of First Instance)

[54] A decade on (2004), Lam J in delivering the judgment of the Hong Kong Court of First Instance in *Muir v Lampl* subscribed to the view expressed by Cheung J in *Greater Beijing*. He held as follows:

> 16 On the last proposition, Mr Whitehead relied on cl 27 of the shareholders' agreement which reads as follows,
>
> 27. ASSIGNMENT
>
> 27.1 This Agreement shall ensure to the benefit of and be binding on each Shareholder and its respective successors and permitted assigns; PROVIDED that none of the Shareholders shall assign or transfer or purport to assign or transfer any of this rights or obligations hereunder without the consent of all the other Shareholders.

17. The defendants contended that by reason of this provision, the shareholders' agreement is, to use the words of Cheung J (as he then was) in Re Greater Beijing Region Expressways Ltd. 'being elevated to the status of a regulation' of the company and *operates beyond the creation of personal obligation between individual shareholders. It follows that the agreement should be regarded as unenforceable even as between parties to the present action*.

18. Mr Smith contended that irrespective of the wordings of cl 27, it could not have any effect vis a vis future shareholders as they are not parties to the agreement.

19. Although the wordings of cl 27 are different from the relevant clause in the agreement considered in *Re Greater Beijing Region Expressways Ltd*, it is a distinction without substance. Unless a potential new shareholder accepts the terms of the shareholders' agreement, the existing shareholders could simply refuse to consent to any transfer of shares. They could also restrain any purported transfer of share without their consent. Further, the board would probably refuse to register such a transfer. In the circumstances, it is unimaginable that a new party could become a shareholder without acceding to the terms of the agreement. It seems to me given the inevitable notice by a new shareholder of the shareholders' agreement before the transfer could be completed by registration, the situation would come within the exceptional cases where a contract could be enforced against third parties discussed in *Chitty on Contracts* (29th Ed) paras 18-125–18-132.

20. I therefore reject the submission of Mr Smith, On this ground, the plaintiff's claim is also unsustainable ...

Rule consistently applied

[55] It is, thus, clear that a shareholders' agreement that purports to bind transferee or new shareholders creates more than just personal obligations or *exeptio personalis* and is, as such, invalid and unenforceable (*Welton v Saffery*: *Russell*; *Greater Beijing; Muir*).

P1 and P1's contention to the contrary

[56] P1 and P2, referring to Lam J's illustration at para 19 of his judgment, contend that a shareholders' agreement that merely purports to, but does not definitively, bind a transferee or new shareholder is not invalid or unenforceable.

[57] Having said that, they then contend that Lam J had gone too far in associating mere purporting to bind as definitively binding — something which is only possible by way of the articles of association. They illustrated that it is quite possible for an acquiring shareholder to acquire all the shares in the company or an acquiring shareholder in a strong bargaining position to negotiate to acquire the shares without having to be bound by the shareholders' agreement.

Court's view

[58] The said passage does not support P1 and P2's contention. I do not think that Lam J was for one moment advocating that the shareholders' agreement must definitively bind the transferee or new shareholders before it becomes invalid or unenforceable. He was merely illustrating how the terms purporting to bind transferee and new shareholders could be actuatlised, ie, if the parties enforced the terms, the new shareholder could be compelled to agree to the shareholders' agreement. Nothing more, and certainly not what P1 and P2 are advocating, should be read into Lam J's speech.

[59] P1 and P2's proposition also cannot be right because there is no way a shareholders' agreement can definitively band transferee or new shareholders. Only the articles of association can; all else will fall short. This interpretation, or rather misinterpretation, would render the rule completely impotent; as good as there not being one.

[60] The rule, I reiterate, is that the shareholders' agreement *must not purport* to create anything more than personal obligations or *exceptio personalis;* and not that it must be definitively binding on non-assenting, transferee or new shareholders.

Courts finding

[61] I am informed by learned counsels that there is, as yet, no local reported cases on this issue. In the premise, I stand guided by *Welton v Saffery*, *Russell, Greater Beijing*, and *Muir*.

[62] In this case, the offending clauses clearly purported to bind transferee or new shareholders. For this reason, I find that the second shareholders' agreement is invalid and unenforceable at law,

THIRD ISSUE

Terms cannot fatter company's statutory rights

[63] Another condition for a shareholders' agreement (or the terms thereof) to be valid and enforceable is that it must, as with articles of association, not fetter the provisions of the Companies Act 2016 ('the CA') that regulate the company powers.

[64] This proposition was discussed by the House of Lords in *Russell*; it held as follows (at p 594);

... In *Bushell v Faith* [1969] 2 Ch 438 ... Russell LJ said, at pp 447–443:

> ... and the well-known proposition that a company cannot by its articles *or otherwise* deprive itself of the power by special resolution to alter its articles or any of them ...
>
> ... To my mind the significant part of this dictum for the purposes of this appeal is the words 'articles *or otherwise*' occurring in the first sentence thereof. These words appear to recognise *that it is not only fetters on the power to alter articles of association imposed by the statutory framework of a company which are obnoxious.* ...

Statutory right to remove director (s 206(1)(a) of the CA)

[65] On this point, D1 and D2 say that D3, a private limited company, has the statutory right to remove a director by ordinary resolution under s 206(1)(a) of the CA that cannot be fettered by *Entrenchment Clauses* and *Voting Clauses.* It reads as follows:

> 206(1) A director may be removed before the expiration of the director's period of office as follows
>
> (a) subject to the constitution, in the case of a private company, by ordinary resolution; or
>
> (b) ...

Proviso for private companies

[66] The purpose of this provision was to address the mischief of majority shareholders being prevented from removing a director they no longer want. This entrenchment of a director may be by way of a contract between the company and the director or the articles of association or, as in this case, by a shareholders' agreement.

[67] For private companies, there is a proviso, 'subject to the constitution', ie, the company may, by its constitution, expressly exclude the statutory right to remove a director by ordinary resolution,

Proviso of no application in this case

[68] That proviso, however, has no application here because D3's articles of association (Table A) does not exclude that right. On the contrary, article 69 thereof reinforces the company's right to remove a director by ordinary resolution:

> 69. [Subject to section 128,] the company may by ordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

[*Note: Section 128 here refers to the section in the preceding 1965 Companies Act. That is in respect of public companies and has no application here.

P1 and P2's contention

[69] To this, P1 and P2 contend that the right to remove directors by ordinary resolution only applies to public companies under s 206(1)(b) and (2) of the CA, where it is stated in absolute terms without any proviso:

> 206(1) A director may be removed before the expiration of the director's period of office as follows:
>
> (a) ...
>
> (b) in the case of a public company, in accordance with this section,
>
> (2) Notwithstanding anything in the constitution or any agreement between a public company and a director, the company may by ordinary resolution at a meeting remove the director before the expiration of the director's tenure of office.

Court's view

[70] The distinction drawn by P1 on P2 PI between private and public companies is only significant if the company has a constitution that expressly excludes the statutory right to remove a director by ordinary resolution, Where there is no constitution or the constitution is silent or, as in this case, the constitution affirms the statutory right, the distinction is one that is without substance.

[71] To underscore this point, I refer to the House of Lords approach to this issue in *Russell*. There, the company's statutory right to increase its share capital was not in absolute terms either, but subject to being authorised by the articles of association. The articles of association did authorise it. The House of Lords went on to find that the company had the statutory right to increase the share capital (at p 591):

> In March 1988 article 131 of the Companies (Northern Ireland) Order 1986 (S.I, 1986 No. 1032 (N.I. 6)) was in force and was in, inter alia, the following terms:
>
> > (1) A company limited by shares or a company limited by guarantee and having a share capital, *if so authorised by its articles*, may alter the conditions of its memorandum in any of the following ways. (2) The company may — (a) increase its share capital by new shares of such amount as it thinks expedient; ...
>
> Article 1 of the articles of association of T.B.L. incorporates the regulations contained in Part II of Table A in the first Schedule to the Companies Act (Northern Ireland) 1960 of which regulation 44 provides:
>
> > *The company may from time to time by ordinary resolution increase the share capital*

A *by such sum*, to be divided into shares of such amount, as the resolution shall prescribe.

It follows that of as the date of the proposed extraordinary general meeting T.B.L had *statutory power to increase its share capital*.

B

[72] In the premise, I agree with D1 and D2 that s 206(1)(a) of the CA, in the present circumstances, gives the company the statutory right to remove a director by ordinary resolution. Any agreement to fetter the company's statutory power to do so is invalid and unenforceable.

C

Severing the obligations between parties

[73] P1 and P2 then say that:

D (a) the *entrenchment clauses* impose an obligation upon on the company vis a vis the shareholders and, in so doing, fetters the company right statutory right to a director by ordinary resolution. They may be invalid and unenforceable;

E (b) the *voting clauses,* on the other hand, are obligations inter se the shareholders and do not place any obligations on the company per se. They are, thus, valid and enforceable; and

F (c) the obligations inter se the shareholders (the *voting clauses* which are valid and enforceable) are severable from the obligations between the company vis a vis the shareholders (the *entrenchment clauses* which not be valid and enforceable). There is, thus, no question that the *voting clauses* are valid and enforceable inter se the shareholders.

Voting clauses valid and enforceable

G

[74] P1 and P2's proposition up to this point is not disputed; the next point, however, is. They go on to say that:

(4) The *Voting Clauses* are valid, even if the effect thereof indirectly fetters the
H company's statutory right to remove to a director by ordinary resolution.

Russell (House of Lords)

[75] Support for the above propositions is found in the House of Lord's
I decision in *Russell*. There, the issue was the validity and enforceability of the parties' voting agreement — written consent of each of the parties was required to increase capital — in light that it fettered the companies' right to increase capital. The dicta is, nevertheless, equally applicable to the present consideration of the right to remove a director by ordinary resolution.

[76] Lord Jauncey, after quoting Lord Davey's dicta in *Welton v Saffery*, went on to say (at pp 593–4):

> ... I understand Lord Davey there to be accepting that shareholders *may (lawfully agree inter se to exercise their voting rights in a manner which, if it were dictated by the articles, and were thereby binding on the company would be unlawful* ...
>
> ... T.B.L.'s undertaking is, however, independent of and severable from that of the shareholders and *there is no reason why the fatter should not be enforceable by the shareholders inter se as a personal agreement which in no way fetters T.B.L. in the exercise of its statutory powers* ...

D1 and D2's challenge

[77] On this last point, D1 and D2 take a contrary view. They say, given that a direct fetter on the company is invalid and unenforceable, it would be wrong to uphold the *voting clauses* which is as much a fetter on the company's statutory right, only indirectly. It is an argument that deserves closer consideration.

Russell (House of Lords)

[78] There was, unfortunately, little by way of explanation in Lord Jauncey's speech to justify how the voting agreement can validly fetter the companies' statutory right to increase capital, which direct fetter is invalid and unenforceable, Lord Jauncey, it would seem, assumed it to be justified.

Bushell (House of Lords)

[79] That assumption is not entirely without judicial rationale. On this point, I found the decision of House of Lords in *Bushell v Faith* [1970] AC 1099 ('Bushell HL') instructive.

[80] In *Bushell HL*, one of the articles of the company provided that in the event of a resolution being proposed at a general meeting of the company for the removal of a director any share held by him should carry three votes per share. The issued capital of the company was equally divided between three persons and an attempt by two shareholders to remove the third from the office of director would necessarily fail because his 300 votes outnumbered the 200 of the two other shareholders.

Issues

[81] The issue was whether the provision for weighted voting rights in the articles of association — in effect, a voting agreement between the shareholders inter se — which indirectly fettered the company from exercising the statutory

right to remove a director by ordinary resolution pursuant to s 184 of the Companies Act 1948 (UK) was valid and enforceable, which reads as follows:

> Section 184 Companies Act 1948 (UK)
>
> *A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him …*

[82] Of particular concern was whether it would be a mockery to approve of an indirect fetter on the company's right to remove a director by ordinary resolution, via a voting agreement between shareholders inter se, which direct fetter on the company itself was invalid and unenforceable.

Decision of the House of Lords

[83] The House of Lords, by a 4:1 majority decision, held that the voting agreement was valid and enforceable.

Minority view

[84] Lord Morris, dissenting, declined to uphold the voting agreement because to do so would, in his view, be a mockery to s 184 of the Companies Act 1948 (UK).

Majority view

[85] The majority held the voting agreement to be valid and enforceable. They acknowledged the conundrum of upholding the voting agreement expressed by Lord Morris; but went on to proffer their reasons, sound reasons that hold sway, for upholding the voting agreement.

[86] In summary, they arrived at their decision by answering two questions.

[87] First, whether the shareholders had the right or freedom to make their own agreement on voting rights — in this case, the right to weighted voting rights? This was answered in the affirmative.

[88] Second, whether parliament intended, by s 184 of the Companies Act 1948 (UK), to exclude that right or freedom in relation to the removal of director by ordinary resolution? This was answered in the negative. If parliament intended s 184 of the Companies Act 1948 (UK) to impinge on the shareholders freedom to enter into voting arrangements that may fetter the company's statutory rights, they could and would have done so. They did not and have, instead, left room for shareholders to make such arrangements.

[89] With that, they concluded, as a matter of statutory interpretation, that the voting agreement was valid and enforceable. A

[90] For a fuller explanation, I have reproduced Lord Donavan's judgment (at pp 1110–11) herein below: B

> My Lords, the issue here is the true construction of section 184 of the Companies Act, 1948: and I approach it with no conception of what the legislature wanted to achieve by the section other than such as can reasonably be deduced from its language.
>
> Clearly it was intended to alter the method by which a director of a company could be removed while still in office. It enacts that this can be done by the company by ordinary resolution. Furthermore, it may be achieved notwithstanding anything in the company's articles, or in any agreement between the company and the director. C
>
> Accordingly any case (and one knows there were many) where the articles prescribed that a director should be removable during his period of office only by a special resolution or an extraordinary resolution, each of which necessitated inter alia a three to one majority of those present and voting at the meeting, is overridden by section 184. A simple majority of the votes will now suffice; an ordinary resolution being, in my opinion, a resolution capable of being carried by such a majority. Similarly any agreement, whether evidenced by the articles or otherwise, that a director shall be a director for life or for some fixed period is now also overreached. D E
>
> The field over which section 184 operates is thus extensive for it includes, admittedly, all companies with a quotation on the Stock Exchange.
>
> It is now contended, however, that it does something more: namely, that it provides in effect that when the ordinary resolution proposing the removal of the director is put to the meeting each shareholder present shall have one vote per share and no more: and that any provision in the articles providing that any shareholder shall in relation to this resolution, have 'weighted' votes attached to his shares, is also nullified by section 184. A provision for such 'weighting' of votes which applies generally, that is as part of the normal pattern of voting, is accepted by the appellant as unobjectionable: but an article such as the one here under consideration which is special to a resolution seeking the removal of a director falls foul of section 184 and is overridden by it. F G
>
> *Why should this be?* The section does not say so, as it easily could. And those who drafted it and enacted it certainly would have included among their numbers many who were familiar with the phenomenon of articles of association carrying 'weighted votes.' ft must therefore have been plain at the outset that unless some special provision were made, the mere direction that an ordinary resolution would do in order to remove a director would leave the section at risk of being made inoperative in the way that has been done here. *Yet no such provision was made. and in this Parliament followed its practice of leaving to companies and their shareholders liberty to allocate voting rights as they pleased.* H I
>
> When, therefore, it is said that a decision in favour of the respondent in this case would defeat the purpose of the section and make a mockery of it, it is being

A assumed that Parliament intended to cover every possible case and block up every loophole, I see no warrant for any such assumption. A very large part of the relevant field is in fact covered and covered effectively, *And there may be good reasons why Parliament should leave some companies with freedom of manoeuvre in this particular, matter. There are many, small companies which are conducted in practice as though they* B *were little more than partnerships, particularly family companies running a family business: and it is. unfortunately, sometimes necessary to provide some safeguard against family Quarrels having their repercussions in the boardroom. I am not, of course, saying that this is such a case: I merely seek to repel the argument that unless the section is construed in the way the appellant wants, it has become 'inept' and 'frustrated'.*

C *Broader application of dicta*

[91] I am mindful that *Bushell HL* was a case pertaining to weighted voting rights in the articles of association. However, the approach of asking the two D questions is, nevertheless, instructive on how the court can resolve this conundrum in other similar circumstances.

Dicta applied to Russell

E **[92]** This approach, in my estimation, justified Lord Jaunceys decision to uphold the voting agreement there,

[93] Applying the dicta in *Bushell HL* there, Lord Jauncey would have inevitably arrived at the same affirmative answer to the first question — that the F shareholders have the right or freedom to agree to voting arrangement via a shareholder's agreement inter se — and the same negative answer to the second question — that the parliament did not intend to exclude that right or freedom in relation to the raising of capital.

G *Court's finding*

[94] I am informed by learned counsels that there is, as yet, no local reported cases on this issue. In the premise. I stand guided by *Russell* and the dicta in *Bushell HL*.

H

[95] On the first question, I am of the view that the shareholders have the right or freedom to agree to voting arrangement (D1 and D2 forfeiting their voting rights) via a shareholder's agreement inter se, just in the same way that the shareholders were free to agree to the weighted voting rights via the articles I of association. There is no significant distinction.

[96] On the second question, it is clear to me that, by s 206(1)(a) of the CA. parliament did not intend to exclude that right or freedom in relation to the removal of director by ordinary resolution. This is all the more so given its

similarities with s 184 Companies Act 1948 (UK) (*Bushell HL*). I am mindful that weighted voting rights has no place in our jurisdiction; but the dicta on the approach to resolving such a conundrum in no less applicable and instructive to our case.

[97] In the premise, I agree with P1 and P2 that the *voting clauses* are valid and enforceable. In other words, P1 and P2 can rely on the *voting clauses* to prevent the majority shareholders from voting thereon to remove a director.

Conclusion of the three issues

[98] In conclusion, i find that the shareholders' agreement is in toto invalid and unenforceable on one ground — that is it is not an agreement creating only personal obligations or *exceptio personalis* but purports to bind transferee or new shareholders. This renders the substratum of the P1 and P2's statement of claim unsustainable and, hence, there is also no serious issue to be tried.

SUIT NO 8 DECISION

[99] It is for these reasons that I dismissed the P1 and P2's application for an interlocutory injunction (encl, 3) and allowed D1 and D2's application to strike out the statement of claim (encl 32),

Other considerations for interlocutory injunction

[100] Finally, in respect of other considerations for interlocutory injunction: I wish to add that had I found the second shareholders' agreement to be valid and enforceable, the circumstances of the case would have justified the granting of the interlocutory injunction to maintain the status quo pending the disposal of the suit proper. But, alas, that was not to be.

SUIT NO 9 DECISION

[101] In respect of Suit No 9, which parties have agreed will follow the outcome of Suit No 8, I accordingly dismissed the P1 and P2's application for an interlocutory injunction (encl 3) and allowed 01 and D2's application to strike out the statement of claim (encl 33).

P1 and P2's applications vide encl 3 dismissed; D1 and D2's applications vide encls 32 and 33 allowed.

Reported by K Selvaraju